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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In The

Supreme Court of the United States

October Term, 1965

No. 1087

ROBERT NATHANIEL BROWN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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THE QUESTIONS PRESENTED

The questions presented are too broadly stated in the petition. The issues before the Court are:

1. Does a passenger in an automobile who is not its owner have standing to object to a search of the vehicle?

2. When a vehicle is stopped for an alleged traffic violation by the driver, is evidence of possession of narcotics, obtained by watching a passenger attempt to hide the narcotics, admissible against the passenger?

3. Does a defendant who has pleaded guilty have an absolute right, after conviction, to withdraw his plea, and to plead not guilty?

STATEMENT OF THE CASE

The statement of facts in the petition requires some amplification.

Detective Faulkner first saw petitioner and his companions in a shopping center parking lot, where they were "acting very suspicious." Faulkner said they were peering into parked cars, and that one took a heavy paper bag from inside the car and put it in the trunk. Faulkner decided to follow and stop the car, and radioed for assistance. The driver, Washington, ignored a stop sign. When Faulkner stopped the car and asked to see Washington's driver's license, he was told the license had been revoked. Faulkner then told Washington he was "under arrest for driving on a revoked permit." It was immediately after this arrest that Faulkner saw petitioner, a passenger in the back seat, take out a brown envelope and attempt to hide it under the floor mat. It was not completely concealed; a corner of it was "sticking out." (Tr. Feb. 24, 1965, pp. 10-17)

ARGUMENT

I.

Petitioner has no Standing to Object to the Seizure

As the petition points out (p. 4), petitioner was a passenger in the automobile driven by Washington. Petitioner testified: "It wasn't my car." (Tr. Feb. 24, 1965, p. 28)

Here this case differs from *Rios* v. *United States,* 364 U.S. 256 (1960), where heroin was taken from a cab hired by the accused, and *State* v. *Hoover,* 347 P. 2d 69 (Ore. 1959),

where the accused was a bailee of the car. In both cases the accused had some possessory interest in the vehicle. Where the accused has no such interest, the cases hold that he has no standing to object to a seizure from the vehicle.

In *Gispert* v. *State,* 118 So. 2d 596 (Fla. App. 1960), a car was stopped for speeding. The police officer shined a flashlight on the window, seeing on the floor boxes and envelopes which contained money. He then put the owner and his companions under arrest. A search of the trunk revealed burglary tools. The court, affirming the convictions, said at page 598:

> "Immunity to an unreasonable search and seizure is a personal privilege to the one whose right has been invaded, and he only is entitled to invoke the constitutional guarantee against unlawful search and seizure. Generally, an accused cannot protest a wrongful search and seizure of premises or property which he does not own or lease or lawfully occupy or possess or in which he has no interest. * * * The fact that the appellants were on a joint nefarious venture, and that one non-owner was driving the car, does not give the two non-owners such occupancy or possession of the automobile or interest therein or the property seized as would place them in a position to claim wrongful search and seizure."

Similarly, in *McCain* v. *State,* 151 So. 2d 841, 845 (Fla. App. 1963), affirming a conviction for possession of lottery tickets, the court said:

> "Appellant had the burden of proving that, at the time of the search, he owned or rightfully possessed or had a lawful interest in the vehicle searched."

In *Carter* v. *State,* 204 A. 2d 322 (Md. 1964), the owner-driver of an automobile gave police permission to search his

car. Police found heroin under the front seat. Affirming the conviction of two passengers, the court said at page 323:

> "Neither of the appellants objected to the search of the automobile. Under decisions of this court *they had no standing to do so.* They had no ownership or possessory rights of any kind in the car * * *. The appellants did not own or control the automobile which was searched, and were not in possession of it." (Italics added.)

II.

The Seizure was not Unreasonable

It is well settled that acts which would constitute an unreasonable search and seizure in the case of a house may be reasonable in the case of a vehicle. *Carroll* v. *United States,* 267 U.S. 132 (1925); *Preston* v. *United States,* 376 U.S. 364 (1964).

In this case, the heroin was dropped to the floor, and partially hidden, in full view of Detective Faulkner. (Tr. Feb. 24, 1965, Pp. 15-17.) Thus, it is similar to the situation in *Fagundes* v. *United States,* 340 F. 2d 673 (1st Cir. 1965), where the officer entered defendant's car to move it and saw money in sacks in the rear of the vehicle. The court said at page 676:

> "This is no search for it is well established that it is not a search to see what is patent and obvious. * * * Police are not required to go about their routine duties with their eyes shut."

Similar cases, where seizures without warrant were held valid, include *People* v. *Dore,* 304 P. 2d 103 (Cal. 1956), *State* v. *Quinn,* 97 S.E. 62 (S. C. 1918), and *People* v. *Johnson,* 294 P. 2d 189 (Cal. App. 1956), in which police could

see the seized articles without a search, and *People* v. *Blodgett,* 293 P. 2d 57 (Cal. 1956), and *People* v. *Cantley,* 329 P. 2d 993 (Cal. 1958), where police observed attempts at concealment.

This case involves a seizure incidental to a lawful arrest. Just before Faulkner saw the heroin he had arrested Washington on the charge of driving with a revoked permit. This —like Washington's ignoring a stop sign—was a misdemeanor committed in the presence of the officer.* The arrest, therefore, was lawful, and the seizure, incidental to the arrest, was lawful, too. 6 C.J.S. Arrest, § 5, pp. 579-84; 79 C.J.S. Searches and Seizures, § 25, p. 795.

The fact that the seizure was of property not related to the observed misdemeanor does not affect the lawfulness of a seizure incident to the arrest. In *Williams* v. *Commonwealth,* 261 S.W. 2d 807 (Ky. 1953), the accused, found asleep at the wheel of a parked car, was arrested for being drunk in public, and a subsequent search, in which a gun was taken from the glove compartment, was held lawful. In *State* v. *Giles,* 119 S.E. 2d 394 (N. C. 1961), a car was stopped for speeding, and the arresting officer, standing outside the car, saw non-tax-paid liquor inside. Since the officer lawfully arrested the driver without a warrant for a misdemeanor committed in his presence, the seizure was held lawful.

Petitioner relies on *Rios* v. *United States, supra* and *United States* v. *Di Re,* 332 U.S. 581 (1948).

Rios supports the lawfulness of the seizure in the instant case. On remand by this Court, the trial court held that the officer had reason to suspect a felony was committed in his presence when he saw the accused, a passenger in a taxi, drop a container of heroin on the floor. 192 F. Supp. 888 (S.D.

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* Code of Virginia, §§ 46.1-173, 46.1-350.

Cal. 1961). Similarly Detective Faulkner, in this case, had reason to believe a felony was committed in his presence when he saw petitioner attempt to conceal the envelope containing heroin. Once he had picked up the heroin, Faulkner promptly obtained warrants charging petitioner and his companions with possession of narcotics (Tr. Feb. 24, 1965, p. 20).

The *Di Re* case involved search *of the person* of the accused, not the search of a vehicle belonging to another.

Where the arrest is for a felony reasonably believed to be committed in the presence of the arresting officer, it is immaterial whether the arrest occurs shortly before, or shortly after, the seizure. See Anno. 89 A.L.R. 2d 715 (1963).

III.

The Defendant was not Entitled to Withdraw his Guilty Plea

The testimony given by officers Faulkner and Terry (Tr. March 4, 1965, pp. 11-15) was heard by the trial judge after petitioner had changed his plea from not guilty to guilty. This testimony thus had no bearing on the finding of guilt or innocence.

> "A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty * * *. While generally no evidence of guilt is required in order to proceed to judgment, for accused has himself supplied the necessary proof, yet in a proper case evidence may be heard *as to the aggravation or mitigation of the offense.*" *Hobson* v. *Youell*, 177 Va. 906, 912, 15 S.E. 2d 76 (1941). (Italics added.)

Whether or not a defendant may be permitted to withdraw a guilty plea is a matter in the sound discretion of the

trial court. *Hudspeth* v. *Tinsley,* 341 F. 2d 293 (10th Cir. 1965); *Glaser* v. *People,* 395 P. 2d 241 (Okla. 1965); *Commonwealth* v. *Soleri,* 202 A. 2d 521 (Pa. 1964).

In some cases it has been held that the court abused its discretion in refusing to permit a plea to be changed, e.g., *United States* v. *Hughes,* 325 F. 2d 789 (2d Cir. 1964), where it was shown defendant's cooperation in pleading guilty was induced by representations made to him by the police, later repudiated; *Smith* v. *United States,* 321 F. 2d 954 (9th Cir. 1963), where the guilty plea was entered on an understanding that a light sentence would be imposed, and it was later discovered that the agreed sentence was less than the minimum prescribed by law; *Letters* v. *Commonwealth,* 193 N.E. 2d 578 (Mass. 1963), where the plea was coerced by threats of a maximum sentence if the case went to trial, and the two cases cited by petitioner: *Rowland* v. *State,* 35 S.E. 2d 372 (Ga. App. 1945), where the defendant had a history of fainting spells, was not represented by counsel and was told by the sheriff he might get off light by entering a guilty plea, and *United States ex rel Perpiglia* v. *Rundle,* 221 F. Supp. 1003 (E.D. Pa. 1963), which involved a confession and a guilty plea which were coerced.

No such situation was present in this case. The colloquy set out at pages 7-10 of the March 4 transcript and pages 4-6 of the May 14 transcript show clearly that no coercion, offer or inducement by the authorities caused petitioner's guilty plea.

No case has been cited holding that refusal to permit a guilty plea to be withdrawn constitutes self-incrimination barred by the Fifth Amendment. There is no evidence in this case that petitioner—represented at every stage by counsel whose competence and diligence are not questioned—was "compelled * * * to be a witness against himself."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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